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State of New Jersey

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July 18, 2001

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Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W., Room 6A266
Washington, D.C. 20054

Re: CC Docket No. 00-49

Dear Mr. Goldberger:

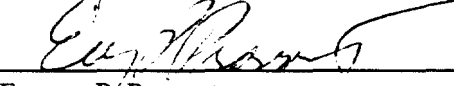
By letter dated July 5, 2001, we provided you with a copy of the responsive brief of the New Jersey Board of Public Utilities filed in the United States Court of Appeals for the 3rd Circuit in AT&T Communications of New Jersey, et al. v. Bell Atlantic-New Jersey, Inc., et al., Case No. 00-200, an appeal by the New Jersey Division of the Ratepayer Advocate from the decision of Katharine S. Hayden, U.S.D.J., below. I now enclose a copy of the transcript of the June 21, 2001 oral argument before the 3rd Circuit in that same matter. A copy is also being filed with Secretary Salas for the Commission's case file.

I certify that a copy of this letter has been sent by First Class mail to all parties on the attached service list. A copy of the enclosed transcript will be provided upon request to any CC Docket No. 00-49 party.

Very truly yours,

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY

By:


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Petition for Declaratory Ruling
CC Docket Number: 00-49

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1 AT&T COMMUNICATIONS OF NEW JERSEY, INC.

2 STATE OF NEW JERSEY DIVISION OF THE

3 RATEPAYER ADVOCATE,

4 PLAINTIF-INTERVENOR IN D.C.

5 VS

6 VERIZON NEW JERSEY, INC.

7 THE NEW JERSEY BOARD OF PUBLIC UTILITIES

8 AN AGENCY; HERBERT H. TATE;

9 CARMEN J. ARMENTI, IN THEIR CAPACITIES

10 AS COMMISSIONERS OF THE BOARD OF

11 PUBLIC UTILITIES

12 STATE OF NEW JERSEY DIVISION OF

13 RATEPAYER AVOCATE,

14 APPELLANT

15 CASE NUMBER 00-2000

16 HEARING DATE 6/21/01

17
18 Counsel for Appellant Counsel for Appellees

19 Blossom A. Peretz, Esq. Eugene P. Provost, Esq.

20 (Division of the (N.J. Board Public

21 Ratepayer Advocate) Utilities, etc.)

22 Frederic K. Becker, Esq.

23 (Verizon New Jersey, Inc.

24 formerly known as

25 Bell Atlantic N.J., Inc.

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1 MS. PERETZ: Good morning. May
2 it please the court, my name is Blossom Peretz.
3 I would like to reserve 5 minutes of my
4 allotted time for rebuttal.

5 JUDGE: Granted. Talk into the
6 microphone.

7 MS. PERETZ: I am here this
8 morning to ask this court to reverse that part
9 of the district courts decision upholding that
10 part of the July 1997 Public Utilities Board
11 Order Docket number TX95120631 which determined
12 that generic rates should supersede arbitrated
13 rates for all interconnection agreements, and
14 specifically for the AT&T and Bell Atlantic New
15 Jersey Arbitration proceeding. In this order,
16 the board reversed its earlier position that
17 generic rates will not supersede arbitrated
18 rates and conditions.

19 JUDGE: You know, I think maybe
20 you ought to start out by convincing us that
21 you have the right to bring this appeal in the
22 first place.

23 MS. PERETZ: The issue of
24 standing?

25 JUDGE: Yes.

1 MS. PERETZ: Okay. I not only
2 have the right to bring this appeal, but if I
3 didn't I would be foregoing my duties not only
4 as the Ratepayer Advocate for the State of New
5 Jersey but as a consumer in the State of New
6 Jersey who will be impacted by the loss of
7 competition due to this decision. Firstly, my
8 office not only represents all consumers
9 before the Board of Public Utilities by
10 Executive Order of former Governor Whitman, but
11 we get calls every day in my office from
12 consumers, and also from potential competitors
13 who want to come into the State of New Jersey but
14 are totally frustrated because of the lack of
15 competition in the State of New Jersey.

16 JUDGE: Are you in fact,
17 necessarily going to be harmed by the ultimate
18 rate which is negotiated because it is under
19 reconsideration, is it not?

20 MS. PERETZ: True. It is not
21 the harm necessarily because of the rate that
22 will be renegotiated, although we thought that
23 the rate was too high. I think the harm is
24 that there's no opportunity for any party to
25 come to Verizon, come to the Board, and seek

1 to negotiate their own rate. All carriers aren't
2 necessarily ubiquitous in the kind of service
3 they want to bring to New Jersey. There are
4 many carriers with different types of the
5 services for different parts of the state.
6 They have separate terms and conditions that
7 are very important to them in terms of
8 competition.

9 JUDGE: But aren't you asking us
10 for an advisory opinion?

11 MS. PERETZ: No, no Judge Roth.
12 I'm asking you to tell the Board of Public
13 Utilities, that pursuant to the Federal
14 Telecommunications Act, the imposition of a
15 generic rate to substitute for any negotiated
16 or arbitrated rate flies in the face of the
17 Federal Telecommunications Act in terms of its
18 policy to bring competition to an industry that
19 had been a monopoly industry for 90 years. A
20 ubiquitous rate is not a competitive rate. That
21 is what competition means. Competition means
22 that every carrier has the opportunity to
23 provide its own rates and services and it wants
24 to compete with Verizon. If AT&T and MCI
25 carriers

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1 COURT: Could you move
2 that a little bit, how do generic rates versus
3 arbitrated rates violate the FCC?

4 MS. PERETZ: Well, there are two
5 issues here. One issue is under the rules of
6 the Federal Telecommunications Act, the Board
7 had no authority to impose its own generic
8 rates. Our part is that we're seeking to
9 negotiate and arbitrate, and that's one issue
10 that I think is very important, the lack of
11 authority of the Board to contravene the very
12 straight and very distinct law that Congress
13 passed. The second part is the intent of
14 Congress in passing the law, and the intent of
15 Congress in passing the law is found in the
16 preamble of the Federal Telecommunications Act
17 which states very simply that if I can find it,
18 well I can tell you what it states. It states
19 that the purpose of this act is to bring
20 competition to the local monopoly
21 marketplace. And competition means
22 different services, different rates, and the
23 ability to negotiate different services and
24 different rates. We've done the same with the
25 electric industry, not necessarily successfully

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1 as yet, but in the Electric Industry now, we
2 had one ubiquitous monopoly company who was
3 servicing all customers. They would go to the
4 Board of Public Utilities, go through a rate
5 case, and come out with one rate for the whole
6 service territory. And now, we have the
7 opportunity for local competitors to come into
8 the state and offer different rates and
9 different services, and that's the essence of
10 competition, which means

11 COURT: But let me go back to
12 Judge Roth's point. I mean, the carrier here
13 is settling up, or is in the process of
14 resolving its dispute. Why shouldn't we wait
15 for a more appropriate case, when there is a
16 carrier who is aggrieved with regard to the prices
17 it can charge, and its bringing it before us,
18 its that they have sort of put you in the middle of
19 the square by yourself.

20 MS. PERETZ: I don't believe so,
21 your Honor. I think the carrier of New Jersey,
22 AT&T had no choice. The Board said, we will
23 only approve an agreement that has the generic
24 rates. The carrier wants to get into the
25 marketplace. The carrier wants to have an

1 interconnection agreement, and it was forced to
 2 accept that rate. Since that time there are
 3 about a hundred interconnection agreements that
 4 have been signed with Verizon that we, in my
 5 office, have in a separate file that we have
 6 been pointing to, where every single
 7 interconnection agreement has the exact rate.
 8 Now, that is not the intent of Congress that
 9 all of the carriers who want to do business in
 10 the State of New Jersey are stuck with the way

11 COURT: Well, it is the intent
 12 of Congress, that if the incumbent carrier and
 13 the competing carrier can negotiate and agree
 14 that there is a very limited review that is
 15 given of that agreement, and I think what you
 16 are asking goes beyond the limited review that
 17 the Board of Public Utilities can give to a
 18 negotiated agreement. Now if you have an
 19 arbitrated agreement, there is a fuller scope
 20 of review, but at this point, we aren't even
 21 sure that between Verizon and AT&T in New
 22 Jersey there is going to be a negotiated
 23 agreement or an arbitrated agreement, or what
 24 the scope of review of that agreement may be.
 25 And don't if you ask us to make a decision on

1 generic rates, aren't we in essence giving just
2 an advisory opinion and that is not a case in
3 controversy which the constitution permits us
4 to decide?

5 MS. PERETZ: Your Honor at the
6 present time, we have just finished the Remand
7 proceeding that was ordered by Judge Hayden,
8 because she determined that the rates the
9 generic rates have been reached in an
10 arbitrary and capricious manner. These are the
11 rates that have been imposed on 100 carriers in
12 the State of New Jersey. We have just finished
13 a proceeding, briefs have just been filed. We
14 now have Verizon at the \$16 rate. We have my
15 office at a \$10, \$9, almost \$10 rate. We have
16 AT&T, MCI at a \$6 rate. Now, we have a range
17 of rates here that have to be decided in that
18 this Board has determined the generic rates of
19 those companies that do not wish to arbitrate.
20 However, I have a deja vu feeling about this,
21 and I don't want to see the generic rate that
22 the Board is going to decide in this case on
23 remand be imposed on every carrier that wants
24 to enter into an interconnection agreement with
25 Verizon. These agreements were two year

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1 agreements, and they are over. So our new
2 venture right now, and for the Board to again
3 take the authority and impose the generic rate
4 on every interconnection agreement, will fly in
5 the face of the intent of the Federal
6 Telecommunications Act.

7 COURT: Notwithstanding the
8 generic rates, the carriers are still able to
9 negotiate and arbitrate new agreements, aren't
10 they?

11 MS. PERETZ: There has been.
12 The Board has said in its orders that we will
13 not accept any rates other than generic rates.
14 There is no opportunity for us at this time,
15 for you carriers to negotiate or arbitrate,
16 because we will not accept any rates but
17 generic rates.

18 COURT: So even if negotiation
19 produces a lower rate, the Board has said it
20 would not accept it.

21 MS. PERETZ: Right. That is the
22 message that the Board has sent out.

23 COURT: But the point is, if
24 you have rights, lets say like AT&T has, and it
25 decides for whatever reason its a big company,

1 that it will resolve those rights consensually
2 rather than continue on with the appeal, there
3 is no longer relating to AT&T a case or
4 controversy.

5 MS. PERETZ: Correct.

6 COURT: You're then coming in
7 and saying however, a case or controversy still
8 exists with regard to the citizens of New
9 Jersey, because we as a matter of the public
10 good have been created for the purpose of
11 seeing that laws are, for the benefit of
12 consumers are implemented and enforced. But
13 you need a controversy to do that, and the
14 parties that were part of that controversy
15 aren't here.

16 MS. PERETZ: Correct.

17 JUDGE: And under the statute
18 the parties to that controversy are permitted
19 to come to a resolution.

20 MS. PERETZ: Well, this Board
21 order did not go only to the AT&T dispute. This
22 Board order is a ubiquitous Board order that
23 flies in the face of the intent of Congress.

24 COURT: You may be 100% right
25 that this is not what Congress intended.

1 Generic rates are an attempt by states to get
2 involved in the act in a way that is just
3 verboten. But that's not what were talking
4 about. You may have every equity on your side,
5 but here, if AT&T or the party directly
6 involved does not choose to bring that forward,
7 what can we do?

8 MS. PERETZ: Well, but AT&T is a
9 very powerful company right now.

10 COURT: And its made a
11 business judgment.

12 MS. PERETZ: Its made a business
13 decision that it wanted to get into the
14 marketplace and it had to negotiate, and
15 currently is negotiating with Bell Atlantic
16 with Verizon and it is very difficult to
17 negotiate with a company when you are in court
18 litigating with the company, and I am not AT&T
19 and I can't read the mind of a corporate
20 decision. I am the Ratepayer Advocate, and I
21 can tell you that under my jurisdiction I
22 thought that the way that the Executive Order
23 was reached, my duty is to make sure that the
24 policies of the State of New Jersey as such
25 that benefit consumers. I consider this

1 particular act of the Board of Public Utilities a
2 policy that will not bring competition; as a matter
3 of fact, there is no competition in the local
4 marketplace in New Jersey since 1996.

5 JUDGE: We will get you back on
6 rebuttal. I think we need to hear from the
7 Appellees at this time.

8 MS. PERETZ: Thank you, your
9 Honor.

10 JUDGE: Mr. Provost.

11 MR. PROVOST: May it please the
12 court

13 JUDGE: Do you want to cock the
14 microphone up a little?

15 MR. PROVOST: Sorry.

16 JUDGE: Thank you.

17 COURT: Mr. Provost, I was
18 curious that the last comment about whether the
19 Board has, in fact, enacted a policy or whether
20 its decision was limited to this particular
21 case, but perhaps you can address that a
22 little.

23 MR. PROVOST: Yes. I certainly
24 want to address that very point, because that
25 is the heart of what the Advocate is talking

1 about. Our order, in fact, not do what the
2 Advocate suggests that it does do. The Board's
3 order, and I simply like to quote from the
4 Board, after a 33 page discussion of the
5 substitution issue, that we discussed at length
6 why we thought it was appropriate in the case of
7 the AT&T arbitration with Verizon, to
8 substitute the generic rates. The Board said:
9 the Board therefore finds that it is in the
10 public interest and in accordance with the law to
11 apply the generic rates, terms and conditions
12 set forth in the order to the interconnection
13 agreement to be entered into between AT&T and
14 Bell Atlantic, New Jersey, to the extent that
15 those rates, terms and conditions have not been
16 successfully negotiated by AT&T and Bell
17 Atlantic. That is a clear description a clear
18 statement by the Board. It does not have a
19 broader applicability beyond the AT&T Bell
20 Atlantic interconnection agreement. There was
21 actually there is one exception. There were a
22 number of agreements

23 COURT: What assurance can we
24 have that in future arbitrations you are not
25 simply going to set those aside in favor of the

1 generic rates?

2 MR. PROVOST: Generic rates,
3 there is a place I should clarify, there is a
4 place in the statutory scheme for a generic
5 type of a proceeding. The act at 252(f) provides
6 for a statement of generally available terms
7 and conditions that's available to any carrier
8 that wants to come into the state. It is one
9 set of rates, terms, and conditions that any
10 carrier can take. 252(g) provides for a
11 consolidation of state proceedings, so that a
12 number of carriers can be brought together in
13 one state proceeding to resolve just the type
14 of issues that we're talking about, rates, terms
15 and conditions. 252(i) in the Act provides for
16 the availability of interconnection agreements
17 in whole or in part that have already been
18 entered into and approved by the state
19 commission to be adopted, to be opted into, by
20 other carriers. So there are various parts of
21 the Act that suggest that harmonization to some
22 extent is not inappropriate.

23 COURT: But doesn't that fly
24 in the face of the Telecommunications Act,
25 which is trying to get the in effect, let the

1 marketplace control, and you're going back to a
2 way of thinking that says no, the marketplace
3 is not going to control, we are going to set
4 the rate, just like we did in 1930 and 40 and I
5 think we did it in 1996.

6 MR. PROVOST: Well, we're
7 certainly not precluding any carrier from
8 negotiating or arbitrating better rates.

9 COURT: But that's what
10 happened here, wasn't it?

11 MR. PROVOST: No. In terms of
12 the AT&T agreement, what happened was

13 COURT: At least initially.

14 MR. PROVOST: Well, the
15 agreement, there was an arbitration, there was
16 an award for the arbitration. The Board's rules
17 that have been in place, required that
18 arbitration award to be placed into an
19 agreement that the Board can review. The
20 parties did not successfully negotiate all the
21 terms after the arbitration award. That
22 agreement was never presented to the Board. In
23 the meantime, there was a generic proceeding in
24 which AT&T, Verizon, the Advocate, many
25 parties participated. Certainly, there were a lot

1 more companies than were participating in the
2 arbitration. We had Sprint, MCI, the New
3 Jersey Telecommunications, Cable
4 Telecommunications Group, we had the Federal
5 Executive Agencies, we had the public Advocate.

6 None of those parties were in the AT&T
7 arbitration. It was a much larger record
8 produced. The Board looked at not just an AT&T
9 Hatfield cost model, but it looked at the
10 public Advocate's cost model, it looked at a
11 Sprint cost model, it looked at additional
12 information that was not available to the
13 arbitrator. The Board determined to use the
14 best available evidence that it felt it needed
15 to

16 JUDGE: And then Bell Atlantic
17 saw your figures and said wow, how could we
18 have been so dumb to agree at the low price
19 that we agreed to?

20 COURT: And besides that we
21 could pass it on.

22 MR. PROVOST: With all due
23 respect, the rates themselves are not at issue
24 here. The rates, Judges Hayden found to have
25 been arrived at in an improper manner. What is at

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1 issue here is the statement, the allegation by
2 the Public Advocate that generic rates in every
3 instance will be applied to every arbitration
4 and every negotiation, and that's simply
5 false. We have said in our briefs to you, we
6 have quoted from our [inaudible]. We have never

7 COUNSEL: You are quoting what
8 from 252(f)?

9 MR. PROVOST: Excuse me?

10 COUNSEL: You are quoting from
11 what, 252(f)?

12 MR. PROVOST: 252(f) I mentioned
13 provides for a statement of generally available
14 terms and conditions.

15 COUNSEL: And you're saying that
16 generally available terms and conditions means
17 that you can set generic rates?

18 MR. PROVOST: No, I'm suggesting
19 that, that term, that provision in the Act, as
20 well as a number of other provisions suggests
21 that there is a likelihood that to some extent
22 rates might tend toward an equal- might tend to
23 be equalized. Let me quote from the FCC's First
24 Report and Order. The FCC made this statement in
25 paragraph 620. In arbitrations of

1 interconnection arrangements for rule makings,
2 the results of which will be applied to
3 arbitrations, states must set prices for
4 interconnection and unbundled network elements
5 based on the forward looking, long run
6 incremental cost methodology we described. The
7 FCC itself recognized that there could be
8 certain at times certain general proceedings.
9 The statute itself, Congress provided for
10 consolidating proceedings. These rates
11 certainly should be at the long run incremental
12 costs. They must be set at a proper level. A
13 rate below that can certainly be negotiated or
14 attempted to be negotiated by other parties,
15 because not only are your rates negotiated
16 within these negotiations, but there are other
17 terms and conditions that can lead in to a give
18 and take process to perhaps lower rates, or
19 perhaps more favorable conditions than are in
20 our generic proceeding, or the results of our
21 generic proceeding. One thing I would like to
22 say to you before I close

23 COURT: But it appears that
24 generic rates here I mean, they lay the ground
25 for the game that will be played. And it seems

1 that if you allow that, for example, you have a
2 provision in the FCC, it is at CFR 51, I think
3 809, which allows other CLECs to choose the
4 rates already negotiated by a previous CLEC,
5 well isn't that in effect overruled if you have
6 generic rates? Because you can't choose them
7 anymore. You can only choose what is given to
8 you by the state.

9 MR. PROVOST: With all due
10 respect, Judge Ambro, we are not telling any
11 public utility, any competitor to take these
12 rates. These rates are available if they want
13 to take them, but they don't have to.

14 JUDGE AMBRO: But you have the
15 power to set aside arbitrated agreements, and
16 to essentially impose your will.

17 MR. PROVOST: The state is
18 obliged to review arbitrated agreements, to
19 determine those rates which it believes are Act
20 compliant. If we didn't do that, we would not
21 be meeting our responsibilities.

22 JUDGE AMBRO: Why were the
23 generic rates applied in this case that would
24 make them inapplicable in other arbitrated
25 cases?

1 MR. PROVOST: In this particular

2 JUDGE AMBRO: In other words,
3 how do we know that in the future you are not
4 going to set additional or other arbitrations
5 aside in order to impose the generic rates?

6 MR. PROVOST: Well, we have said
7 that we were not going to do that. The states
8 orders have said that. Judge Hayden, her
9 decision went only to the AT&T Agreement when
10 she said substitution in this case was
11 appropriate. She said the Board acted
12 according to the telecommunications act. It
13 fulfilled its duties. The complaint that AT&T
14 brought in the district court, and which
15 the applicant adopted into, only
16 challenged the substitution in the AT&T
17 arbitration. It did not challenge it did not
18 already, if the Board was going beyond the AT&T
19 arbitration, and I think what the Advocate is
20 doing is distorting what the Board has done,
21 and is going well beyond what Judge Hayden
22 discussed.

23 JUDGE: Thank you. Mr. Becker.
24 And since we didn't have time to discuss
25 standing with Mr. Provost, what is your

1 position on standing of the Ratepayer?

2 MR. BECKER: Our position Good
3 morning your honors. May it please the court.
4 Our position on standing, your Honor, has been
5 briefed and our position is that the issues are
6 moot. The Ratepayer Advocate has no standing.
7 The fact of the matter is that the agreement
8 which is the only agreement before this court
9 was the interconnection agreement between AT&T
10 and Verizon. That agreement was terminable by
11 either party by its terms last July. I mean,
12 its still in effect, but there's an ongoing
13 generic proceeding. There is an ongoing
14 arbitration between AT&T and Verizon. AT&T has
15 determined that with respect to rates it will
16 rely on the new generic proceeding, and with
17 respect to other terms it will either rely on
18 negotiation or an arbitration.

19 JUDGE AMBRO: But an issue is
20 moot if one of two things happens, one of which
21 is, if the issue is a problem, is not likely to
22 recur. Isn't this problem going to recur?

23 MR. BECKER: Well, the fact,
24 Judge Ambro is that not only is this problem
25 not likely to recur, but this problem

1 JUDGE AMBRO: With anyone. Not
2 just you.

3 MR. BECKER: The problem can't
4 possibly recur. And the reason that it can't
5 possibly recur is because the Advocate has
6 taken and I say it respectfully, an incorrect
7 position as to the meaning of the Board's
8 generic order. The Board has already indicated
9 to the court that its generic order had the
10 following limitations. It applied to the then
11 arbitration decisions which had incorporated
12 an interim rate pending the result of the generic
13 proceeding, and it applied to the AT&T-Verizon
14 interconnection agreement. It didn't apply to
15 anything else. The Board has made clear that
16 it will not supersede arbitrated rates or
17 negotiated rates, except in accordance with a
18 statute. The fact of the matter Judge Ambro,
19 and you raised the question also Judge Fuentes,
20 is that the reason the Board superseded the
21 arbitrated rates in this case was because the
22 arbitrated rates were not Act compliant. The
23 Board went through a meticulous analysis of
24 Hatfield 2.2.2, and Judge Ambro, I'm glad I'm
25 not the one who has to explain to you the

1 difference between TSLRIC and TELRIC, but
2 the Board went through a comprehensive
3 appraisal of Hatfield 2.2.2 which was what the
4 arbitrator essentially relied on in this case.
5 And the Board determined that that Hatfield
6 study was underengineered, would not result in
7 a system that worked. You put it in plain
8 English when you called a number you wouldn't
9 get a dial tone if you relied on Hatfield 2.2.2
10 because it wouldn't work. More importantly in
11 terms of the statute, the Board specifically
12 stated in its generic order that the rates
13 which were generated by the arbitrator based
14 upon Hatfield were not just and reasonable.
15 Therefore, they were not compliant with section
16 252(d) of the Act. Under those circumstances
17 the Board under 252(e) was obligated to set those
18 rates aside. And to _____ that, the Board
19 could have done two things, the Board could
20 have rejected the agreement, and then we would
21 have had no agreement, and that certainly would
22 not spur competition, or the Board did what it
23 did, could have done what it did.

24 JUDGE AMBRO: That is South
25 Philly, don't worry about it.

1 MR. BECKER: I am trying to keep
2 this in the English language. Could have done
3 what it did, which was to incorporate the
4 generic rates, which have been the result of a
5 comprehensive proceeding, intended to be TELRIC
6 compliant, intended to be act compliant and go
7 forward with an agreement which had rates which
8 would allow for just and reasonable rates in
9 accordance with the statute. Now this, there
10 was nothing that was extraordinary about that
11 conduct by the Board. The FCC in the
12 Texas Preemption case, which was cited in the
13 Briefs, the FCC stated in that case as
14 acknowledged by the Ratepayer Advocate on page
15 38 of its initial brief here, that when the
16 state commission represents what it will do,
17 and what that representation is, that what it
18 will do will be Act compliant under sections
19 251, 252 and 253, the FCC will accept those
20 Board commission representations, and it
21 will not attempt to preempt in those
22 circumstances. That's what's happening here,
23 your Honor. For all practical purposes, the
24 Ratepayer Advocate is saying, lets not listen to
25 what the Board says its generic order means,

1 the Board says it will do with respect to
2 its -- let's not accept the Board's
3 representations, unlike the Federal
4 Communication Commission, which does accept
5 those representations, let's take this other
6 interpretation of the generic order, and as a
7 result of that other interpretation, we will
8 run into the problem which your honors have
9 alluded to, which means you could have a
10 recurring situation. But if you take the
11 generic order for what it really is, and for
12 what the Board tells us it is, this problem
13 can't recur. The Ratepayer
14 Advocate is not aggrieved. Nobody is
15 aggrieved. AT&T is not here participating in
16 this appeal. The time for us to be in the
17 district court, and perhaps back here is when
18 the new generic rates come out, and anybody who
19 is troubled by the new generic rates, or
20 there's a new arbitration, and the Board acts
21 in such a way that somebody is aggrieved by
22 that action, but there is nothing here now for
23 this court to decide except to render an
24 advisory opinion which will have no particular
25 future meaning. It has no consequence is the

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1 point. I wanted to I mean, I don't want to get
2 off that subject because I think its important,
3 and its important to the court, there was one
4 other point I wanted to

5 JUDGE AMBRO: And you're
6 saying that with no other carrier, I mean, I
7 guess what almost sounds like what you're
8 saying is that anybody, you or anybody else
9 that enters into negotiations with a CLEC
10 after the generic rates have been published,
11 you would never accept a rate lower than a
12 generic rate.

13 MR. BECKER: Well, you could go
14 to arbitration, Judge Ambro, and you might get
15 a lower rate, but you know, there is nothing
16 wrong

17 JUDGE AMBRO: But what's the
18 incentive for you to do it? You? Your client?
19 Nothing for him.

20 MR. BECKER: You say [inaudible]
21 Left to do it?

22 JUDGE AMBRO: Yeah.

23 MR. BECKER: It would be back at
24 a lower rate, because the Board if I went to
25 arbitration as a CLEC, and I had

1 achieved a lower rate in the arbitration than
2 what the generic rate was, the Board, unless it
3 could show that that lower rate was not Act
4 compliant, would accept the result of the
5 arbitration. It would have accepted the result
6 of the arbitration in this case, except that
7 the rates were not Act compliant. Its a
8 fiction, your Honor that suggests that the
9 Board set aside that arbitration because the
10 arbitrated rates were not the generic rates.
11 That is plain from the generic order that
12 that's not what happened. What's happened is
13 that those rates were set aside because they
14 didn't comply with 252(d) of the act. They were
15 not just and reasonable. The generic
16 specifically says they were not just and
17 reasonable. And they would not have resulted
18 in a system that worked. That's the problem.

19 JUDGE AMBRO: So the public
20 Advocate has no standing now and they would
21 still have no standing after the new generic
22 rates come out and they are applied, they still
23 have no standing.

24 MR. BECKER: They would have
25 standing if they wanted to challenge the new

1 generic rates.

2 JUDGE ROTH: It is usually a
3 particular agreement.

4 MR. BECKER: Yes.

5 JUDGE ROTH: Yeah.

6 MR. BECKER: But I think right
7 now we are in an abstraction. Nobody is
8 aggrieved. The court will render a ruling
9 which will have no meaning, and we'll be right
10 where we are if the court didn't act at all,
11 because there's no standing. The issue is
12 moot. There is no issue.

13 JUDGE ROTH: You said you had
14 another issue you wanted to deal with.

15 MR. BECKER: If its all right
16 and I see it's the red light, Judge, now.

17 JUDGE ROTH: Briefly.

18 MR. BECKER: I want to keep my
19 admission before the court. Very briefly, the
20 issue is that there's been a significant

21 JUDGE ROTH: Anyone named Becker
22 has got to be...

23 MR. BECKER: Can't be all bad.
24 Without [inaudible]. I have a very high regard
25 for Judge Becker. Judge Roth, the second issue

1 is that there has been an implication here
2 there is more than an implication. The
3 advocate has taken the position very strongly
4 that rate consistency is somehow inconsistent
5 with the Congressional intent. Now I would
6 like to very quickly explain to the court if I
7 can do it in a minute, why it is entirely
8 consistent with the Congressional intent and
9 indeed it had to be contemplated by Congress.
10 And the reasons are the following: First of
11 all, interconnection rates under 252(d) are based
12 on the costs of the incumbent carrier. They
13 are based on costs. The incumbent carriers
14 costs don't change. Therefore, in any rational
15 system of adjudication, the rates to the
16 CLEC based on the costs of the ILEC
17 are going to be very close in the absence of
18 special circumstances when those costs that are
19 somehow impacted by the CLEC. In particular,
20 maybe servicing a small area, maybe
21 it has some special circumstances, otherwise
22 Congress must have contemplated as the FCC must
23 have contemplated that the rates would be very
24 close, otherwise basing them on costs it really
25 tells you that. Second of all, the rates have

1 to be non- discriminatory under 252 and under
2 251. So therefore, unless there's a reason for
3 them to be different, they're going to be cost
4 based and they're going to be essentially the
5 same. The act permits consolidated arbitration
6 under 252(g). Finally, a single arbitrator here
7 in a series of cases where the result is going
8 to be based on the cost of the item, is going
9 to come out with the same similar results. It
10 is necessary that, that would happen. Second
11 of all, the act permits, an ILEC to file a
12 statement of generally applicable terms
13 pursuant to 252(f). You have heard Mr. Provost
14 allude to that. What that means is that an
15 ILEC could file a statement of generally
16 applicable terms which would include rates.
17 And those would be in effect, if it please the
18 court, not the same as, but analogous to the
19 Board established generic rates, because the
20 Board would have had to approve the statement
21 of generally applicable terms. Judge Ambro
22 referred to the most favored nations clause,
23 which is 252(i) of the act, and the
24 Advocate has conceded that that statutory
25 provision itself provides for a certain measure

1 of consistency, because what it means in this
2 context is that if I as a CLEC am able to
3 negotiate a better rate for some reason, other
4 CLECs could opt into that provision under
5 252(i) which is essentially a pick and choose
6 provision. This same contemplation of
7 uniformity is found throughout the FCC
8 determinations in these proceedings. Mr.
9 Provost has referred to section 620, which is
10 before your Honors, where the FCC contemplates
11 that generic rates would be imposed into
12 arbitrated agreements. It says that in those
13 very words. And section 623, all those appears
14 in the supplemental appendix on page 20 SA,
15 contemplates that when the state has not had
16 time to do its cost studies, it will impose the
17 FCC default proxy rates. Those are the same
18 rates for the whole state. They don't vary. So
19 in that context the FCC anticipated some degree
20 of consistency, and those were interim rates if
21 it please the court, not permanent rates. And
22 finally, the FCC order has throughout
23 references to a single TELRIC rate. Now
24 a single TELRIC rate will generate a
25 single group of costs, and a single group of

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1 costs will necessarily generate consistent
2 rates that the CLECs will have to pay under
3 252(d) which says that the interconnection rates
4 are to be cost based. I appreciate the extra
5 time.

6 JUDGE ROTH: I call that a real
7 Becker minute, and I will not specify which
8 Becker I'm referring to.

9 MR. BECKER: I did my best,
10 Judge.

11 JUDGE ROTH: Thank you, Mr.
12 Becker. Ms. Peretz will

13 JUDGE AMBRO: He's a nice guy,
14 come on.

15 MS. PERETZ: Thank you, your
16 Honor. I think I deserve extra extra time
17 because I have two opponents here.

18 JUDGE AMBRO: Let me ask you, in
19 the generic proceeding, did you participate
20 in the proceeding?

21 MS. PERETZ: Correct. We did
22 participate.

23 JUDGE AMBRO: You spoke, you

24 MS. PERETZ: We had a model. We
25 had a cost Model. We cross examined

1 witnesses. We are very active participants in
2 every case before the Board of Public
3 Utilities. We filed testimony, we cross-
4 examined witnesses, we filed briefs.

5 JUDGE AMBRO: You did so as
6 what? Obviously not a party. You did so as a
7 Amicus?

8 MS. PERETZ: According to the
9 executive order, we are a party in every case
10 before the Board of Public Utilities. We stand there
11 on behalf of consumers, and also, we're there not
12 only in rate cases, but under the executive
13 order. We are there also to play an active role
14 in policy making. Policy making I think is
15 more important now in terms of our role than
16 anything else we do. We support legislation,
17 we testify before the legislators.

18 We represent and work together with groups
19 like the AARP group, low income ratepayers, the
20 group of the MAPSA, a group here from

21 JUDGE ROTH: You know, but keep
22 in mind that we don't create policy. We deal
23 with cases in controversy, and that limits a
24 lot of the things that we can do.

25 MS. PERETZ: I would like to

1 just go review things in response to what
2 was said here, counsel for Verizon, Mr. Becker
3 said that one of the reasons that the Board
4 rejected the arbitration agreement was because
5 it used the Hatfield model. I would like to
6 put the court on notice of something that you
7 probably do know, but the Hatfield model was
8 used by the Board of Public Utilities in
9 reaching the generic rates. But the Hatfield
10 model was a 40%, 60% was the Verizon model, so
11 the Board itself used the model that it
12 rejected when it rejected the arbitration
13 agreement.

14 JUDGE AMBRO: Did the Board make
15 a determination that the arbitrator did not
16 pursue a ruling that was in compliance with the
17 act?

18 MS. PERETZ: No. The Board of
19 Public Utilities told the parties right before
20 the end of the negotiation that it
21 would not accept anything but the generic
22 rates. The Board set that policy. And so
23 while AT&T had one interconnection
24 agreement they proposed based on the
25 arbitrators agreement, Verizon had another

1 interconnection agreement that they proposed,
2 which was not which was based on the Board's
3 generic policy, they each submitted their own
4 agreement to the Board. The Board could not
5 accept an agreement not signed by both parties,
6 and told them you have to submit one agreement
7 that you both will sign and the only agreement
8 we will accept is the one based on the generic
9 rates, and that's the way the Board decided the
10 arbitration. And ever since that time I have
11 said there has been only one generic rate that
12 has been in every agreement that has been filed
13 by the Board of Public Utilities for approval,
14 and that's it.

15 JUDGE AMBRO: Well, looking at
16 the order which provides that the arbitration
17 did not have a complete cost study record upon
18 which to rely.

19 MS. PERETZ: Right. But because
20 they rejected the Hatfield model that was used
21 in the cost that Verizon did not put in its own
22 cost study, Verizon said we're sorry, we don't
23 have a cost study ready at this time, so they
24 did not put in their cost study. AT&T put in
25 the Hatfield cost study. the Board said

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1 Hatfield was not a reliable cost study. We
2 won't we can't rely on the Hatfield. They also
3 used at that time the FCC had issued proxy
4 rates that were also used by the arbitrator in
5 determining the rate, but by the time the
6 arbitration was over, the Board said sorry, we
7 will only accept our generic rate, and that was
8 it and so whatever the arbitrator had decided,
9 and then the Board used the Hatfield model for
10 its own generic rate, totally in opposition to
11 what it said as to why it rejected the
12 arbitrators decision. So, what the Board did,
13 I believe was totally road block competition in
14 New Jersey, and they have said themselves,
15 there is no competition. Very quickly, I have
16 a lot to tell you, but I would like to just
17 quickly read from the Board's Order, In The
18 Matter Of Investigation Regarding Local
19 Exchange Competition. This is the generic
20 order, and there's a whole chapter entitled "Why
21 Generic Rates Should Supersede Arbitrated Rates."
22 And it is not only for the AT&T Bell Atlantic
23 negotiation it is for every single negotiation
24 coming.

25 JUDGE ROTH: But any agreement

1 that comes out, when it has come out, we can
2 object to it, but you are here in this case at
3 a time when there is not an agreement for you
4 to object to.

5 MS. PRETEZ: Right. But I am
6 here because I want to reverse Judge Hayden's
7 finding that the Board could supersede generic
8 rates with a negotiated or arbitrated rate.
9 That's what I'm looking for.

10 COUNSEL: Can't the judge do
11 that when the judge determines that the
12 arbitration process was flawed? When the
13 arbitration process is not in compliance with
14 the act?

15 MS. PERETZ: The arbitration
16 process was flawed and as you have noticed I
17 was not in the arbitration process. My concern
18 is that the Board of Public Utilities
19 superseded the statute, that there's a statute
20 that they superseded that said they had to
21 accept or reject an arbitration agreement,
22 okay. What the Board did was not accept or
23 reject an agreement. They accepted or rejected
24 an agreement when at last that agreement was
25 based on their own rates, and they didn't even

1 have to they did nothing in terms of the
2 arbitrator's decision. They had to accept or
3 reject the arbitrator's decision. That's not
4 what happened here. What they did was fly in
5 the face of the exact directive of the act, and
6 that's something I haven't had a chance to
7 discuss with you yet, but that's the essence of
8 my whole theory.

9 JUDGE ROTH: Your red light is
10 on. Do you want to take one minute and sum up
11 any.

12 MS. PERETZ: Okay. Summing up,
13 I believe that I do have standing to be here.
14 I have both direct and associational standing
15 if you read the recent case on Friends of the
16 Earth, which is a recent case which talks about
17 my standing to be here on behalf of the
18 consumers of the state of New Jersey.

19 JUDGE ROTH: Well, certainly we
20 have no issue with that. Okay. But the issue
21 is

22 MS. PERETZ: It is
23 recurring. It will recur unless the
24 Board is told that it cannot supersede an
25 arbitration. This is what they did. And I

1 would like to go back for one minute to the
2 statute, and I don't know if we have time to go
3 back to the statute, but under the statute they
4 could reject or accept an arbitration an
5 arbitrator's agreement. The Board did not
6 accept or reject the arbitrators agreement in
7 the AT&T-Bell Atlantic case, and in the
8 AT&T-Bell Atlantic case took it upon itself to
9 put in its own decision based on its own
10 generic rates

11 JUDGE AMBRO: Then AT&T then
12 said fine, well accept that.

13 MS. PERETZ: Well, AT&T had no
14 choice. What was AT&T to do? They submitted
15 something to the Board which Verizon had at
16 that time.

17 JUDGE AMBRO: For whatever reason
18 that you will get your day. The question is

19 JUDGE ROTH: AT&T could have
20 done what they did in Pennsylvania. Said we
21 don't like the terms here.

22 MS. PERTEZ: They didn't like
23 the terms obviously. AT&T is now in this new
24 case on remand and we could have what I'm
25 concerned about in the remand.

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1 JUDGE ROTH: Fine. Thank you.

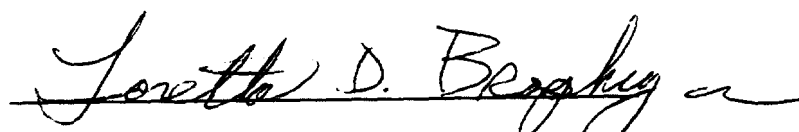
2 We will take the case under advisement, and we
3 will ask the attorneys to arrange with the
4 court to have a transcript of this argument
5 prepared.

6 MS. PERETZ: Thank you.

7 (END OF HEARING)
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C E R T I F I C A T E

I hereby certify that the proceedings
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